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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 224

FORREST G. GOOD, ET AL.,
Appellants,

vs.

THE DOW CHEMICAL COMPANY

APPEAL FROM THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

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IN THE COURT OF CIVIL APPEALS
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT GALVESTON

No. 12,374

FORREST G. GOOD, ET AL.,
Appellants,

v.

THE DOW CHEMICAL COMPANY
Appellee

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellants file their statement disclosing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion which is reported at 247 S. W. 2d 608. The opinion of the Court of Civil Appeals is made a part hereof, as Appendix A.

Question Presented

Does the state statute authorizing injunction, as enforced, construed and applied in this case, abridge the appellants' rights of freedom of conscience and freedom of worship, contrary to the First and Fourteenth Amendments to the Constitution of the United States?

This question was raised in the answer of the appellants filed in the trial court (Tr. 23-30).[1] It was again presented to the Court of Civil Appeals. See opinion of that court in the appendix to this statement as to jurisdiction. It was presented to the Supreme Court of Texas by petition for writ of error.

Statute Involved

This case is one in which the validity of state legislation is drawn in question, to wit: Article 4642 of the Revised Statutes of Texas, 1925, which reads as follows:

> Judges of the district and county courts shall, in term time or vacation, hear and determine applications for any may grant writs of injunction returnable to said courts in the following cases:
>
> (1) Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.
>
> (2) Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.
>
> (3) Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

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[1] Figures appearing herein within parentheses preceded by "Tr." refer to pages of the clerk's Transcript.

(4) Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law.

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellants rely upon read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within Its jurisdiction the equal protection of the laws.

Matters Related to Jurisdiction

Timeliness

The judgment of the Court of Civil Appeals affirming the judgment of the District Court was entered March 27, 1952. Petition for writ of error to the Supreme Court of Texas was denied on May 14, 1952. The judgment affirming the judgment of the trial court became final on May 14, 1952. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Highest State Court

The refusal of the discretionary remedy by the Supreme Court of Texas makes the Court of Civil Appeals the highest court in Texas in this case. *San Antonio & Aransas Pass Railway Company* v. *Wagner*, 241 U. S. 476, 477.

Nature of Case

This appeal involves a suit for injunction brought by the appellee against the appellants whereby appellants' constitutional rights to meet in a public park maintained by the appellee have been denied by the permanent injunction issued by the District Court of Brazoria County, Texas, forbidding the appellants from entering the public park and holding meetings therein. The judgment granting the injunction has been affirmed by the Court of Civil Appeals and the Supreme Court of Texas has refused to review the judgment.

How Constitutional Questions Raised

The constitutional questions were raised in the answer of appellants and in the motion for judgment in the District Court of Brazoria County, Texas (Tr. 24, 26, 28, 30-34). The question presented in that court was considered and overruled (Tr. 36, S. F. 460-463).[2] The question was presented on appeal to the Court of Civil Appeals. See Appendix. The federal question presented upon this appeal also was presented to the Supreme Court of Texas by petition for writ of error.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 28 U. S. C. 1257(a).

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[2] Figures appearing herein within parentheses preceded by "SF" refer to pages of the stenographer's Statement of Facts filed herein.

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Statement of Case

The Proceedings

This suit was brought by verified petition filed in the District Court of Brazoria County, Texas seeking an injunction restraining appellants from exercising their constitutional rights on the property of appellee known as Lake Jackson Picnic Grounds (Tr. 1-13). A temporary restraining order was granted (Tr. 13-17). The appellants answered, pleading estoppel and that if the injunction was granted there would be a denial of their rights to freedom of assembly, speech and worship contrary to the First and Fourteenth Amendments to the United States Constitution and Sections 6, 8 and 27 of Article I of the Constitution of Texas (Tr. 23-30).

The case was tried upon a hearing for permanent injunction pursuant to stipulation of the parties on September 20, 1951 (Tr. 34). Evidence was taken and reported (S. F. 1-528). Appellants made motions to deny the injunction and for judgment (Tr. 30-34). The motions were denied with exceptions (Tr. 36, S. F. 460-463). Judgment was entered in favor of the appellee for permanent injunction (Tr. 34-40).

The Facts

The privately owned public park in question, known as Lake Jackson Picnic Grounds, is located on The Dow Chemical Company property in Brazoria County, Texas (S. F. 4-5,

26). These picnic grounds have been improved by appellee. The grounds are thickly studded with trees, beneath which are a large barbecue pit, a large pavilion in which is a nickelodian and public telephone. Also on the grounds are a large number of picnic tables and park benches, walk ways, small individual barbecue pits, garbage receptacles and a public toilet. Also located on the grounds is a residence maintained by appellee for its caretaker (S. F. 12, 67).

The general public is invited to use the facilities of the picnic grounds except when they are reserved for the exclusive use of the appellee or for a specially designated function (S. F. 16). The people of Lake Jackson and the entire Brazos Port area of Brazoria County are invited to use the picnic grounds (S. F. 88-89). The use is not confined to employees of the appellee or members of the Lake Jackson Farm Association (113).

Appellants were allowed to hold religious meetings in the park at first (S. F. 339, 493). A series of Sunday meetings was planned (S. F. 402-403). After a few meetings were held the appellee ordered the appellants to stop holding meetings in the park (304, 314-315).

A protest to an officer of the appellee against the discrimination practiced by allowing other religious organizations to hold church meetings in the park and not allowing Jehovah's witnesses to do so was made (S. F. 304-307, 424-427). The officer declared that all other religious organizations could use the park except appellants who would be denied the use of it (S. F. 447). Appellants were the only religious group ever to be denied permission to use the park (S. F. 364).

Appellants planned to use the park over the protest of the appellee (S. F. 268). On the date appellants were to use the park special policemen, employed by the appellee, erected a road block and barrier across the road leading

into the park, forcibly kept the appellants out of the park and prevented appellants from entering the park (S. F. 177, 226-227). The barrier was put up for the specific purpose of keeping the appellants out of the park (S. F. 226, 257). The Methodist Church was permitted to have a meeting in the park on the day that appellants were excluded (S. F. 226, 235-237, 253).

Appellants planned to return to the park to hold a meeting on the following Sunday (S. F. 231-232, 451-453). On learning this the appellee obtained a temporary restraining order against the appellants.

The picnic grounds are large enough to accommodate easily 800 persons (S. F. 114). The facilities are capable of serving 400 picnicers (S. F. 291, 300). Thirty-five people—the size of appellants' meetings—would, at no time, prevent other people from enjoying the remaining facilities (S. F. 113-114, 117-119).

At all times when Jehovah's witnesses made use of the picnic grounds there was plenty of space for others because there was never more than 150 in the entire picnic grounds at such times (S. F. 437). The number was said by the Plant Protection policemen not to be too great (S. F. 146).

The undisputed evidence showed that at all times the speeches given by Jehovah's witnesses were proper. There was no undue noise or racket; there was no annoyance; there was no loud and boisterous talk. There was no vulgar or profane language and there was no improper conduct on the part of Jehovah's witnesses or the speaker (S. F. 144-146, 196). There were no threats of violence or disturbance of any kind (S. F. 436-437).

The Question Is Substantial

The practice carried on by the appellee whereby all other religious organizations are allowed to use the park and

whereby only one organization, the appellants', is denied the right to use the park for religious purposes is discrimination of the baldest kind. This practice of discrimination which has been approved by the judgment for injunction appealed from constitutes a deprivation of the rights of the appellants contrary to the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution. Permission to other religious organizations to use the picnic grounds for religious meetings and services, while refusing the same rights to Jehovah's witnesses, constitutes the deprivation of freedom of speech, freedom of assembly and freedom of worship contrary to the First and Fourteenth Amendments to the United States Constitution in violation of the equal protection of the laws.

In *Niemotko* v. *Maryland*, 340 U. S. 268, the Court said: "In this Court, it is argued that state and city officials should have the power to exclude religious groups, as such, from the use of the public parks. But that is not this case. For whatever force this contention could possibly have is lost in the light of the testimony of the Mayor at the trial that within his memory permits had always been issued for religious organizations and Sunday-school picnics." (340 U. S. at pages 272-273.)

"It thus becomes apparent that the lack of standards in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permit was a denial of equal protection. Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall." (340 U. S. at page 273.) See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Quaker City Cab Co.* v. *Pennsylvania*, 266 U. S. 390, 402.

In *Truax* v. *Corrigan*, 257 U. S. 312, 331-333, it is said: "But the framers and adopters of this (Fourteenth) amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

The evidence is without dispute that there was such discrimination practiced. Over twenty-five different permits to religious organizations to use the picnic grounds were granted by the appellee while the same use was denied the appellants. On the first Sunday appellants used the park the Episcopalians were holding church services. The park had been reserved to the group for outdoor religious services. The preacher had an altar and was seen bowing before the cross and preaching to the congregation on the picnic grounds on June 10th.

On September 10, 1951, the day that the appellants were excluded from the picnic grounds, the Methodists were in the park, using it with permission of the appellee under the protection of its Protective Division.

The contention is made by the appellants that Article 4642 of the Revised Statutes of Texas authorizing injunctions is perfectly valid as written but has been enforced in an unconstitutional manner. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that a valid ordinance had been enforced in a discriminatory and unconstitutional manner by the city officials contrary to the federal Constitution. In *Concordia Fire Insurance Company* v. *Illinois*, 292 U. S. 535, at page 545, it is said that the validity of a law depends on how it is

construed, applied and enforced. The jurisdiction of the federal courts in injunction suits has been explicitly extended to restrain perfectly valid statutes that have been enforced by administrative agents in an invalid manner. *Greene* v. *Louisville & Interurban Railroad Co.*, 244 U. S. 449, 506-508; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Louisville & Nashville Railroad Co.* v. *Greene*, 244 U. S. 522, 527, 528, 530, 531; *Sterling* v. *Constantin*, 287 U. S. 378, 393; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434.

Regardless of where the title to public parks or picnic grounds may rest, the fact remains that they are, by the Constitution, held open for use as places of public assembly. In *Hague* v. *C. I. O.*, 307 U. S. 496, 515-516, the Court said:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."

The mere fact that the property in question is privately owned and that the regulations involved are those of a private corporation does not in any way preclude appellants from invoking the benefits of the First and Fourteenth Amendments to the United States Constitution.

It is judicial sanction to the private regulations that gives the appellants the right to invoke the federal Constitution. In *Marsh* v. *Alabama*, 326 U. S. 501 and *Tucker* v. *Texas*, 326 U. S. 517, the controversy grew out of the conflict between the proprietary rights of owners of real estate and the constitutional rights of Jehovah's witnesses. The Court, nevertheless, held that the First and Fourteenth Amend-

ments could be invoked by Jehovah's witnesses because of the judicial sanction extended by Alabama and Texas to the regulations involved in these cases.

This case is controlled by *Marsh* v. *Alabama*, 326 U. S. 501, in which Grace Marsh distributed magazines on the sidewalks of Chickasaw, a privately owned town, contrary to the wishes of the management, without a permit. She was arrested and prosecuted for trespass. A conviction was sustained by the higher courts of Alabama. It was argued that the absolute ownership and lack of dedication to the public as public property of the sidewalks and other places enabled the corporation to insist that there was a violation of its property rights amounting to trespass. The same contention was sustained by the state courts, relying upon the fact that there had been no public dedication. The Court rejected this view, saying: "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a home-owner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

A similar ruling was made in *Tucker* v. *Texas*, 326 U. S. 517. Tucker persisted in door-to-door distribution of literature in the Hondo Navigation Village in Medina County, Texas, without a permit from the manager of the project. He was convicted of trespass when he refused to leave as ordered by the manager. "The only difference between this case and *Marsh* v. *Alabama* is that here instead of a private corporation, the federal Government owns and operates the village. This difference does not affect the

result." "It follows from what we have said that to the extent that the Texas statute was held to authorize appellant's punishment for refusing to refrain from religious activities in Hondo Village it is an invalid abridgment of the freedom of press and religion." (326 U. S. at page 520)

Watchtower Bible and Tract Society, Inc. v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, certiorari denied 335 U. S. 886, rehearing denied 335 U. S. 912, and *Hall* v. *Virginia*, 188 Va. 72, 49 S. W. 2d 369, appeal dismissed 335 U. S. 875, rehearing denied 335 U. S. 912, are not controling. In those cases there was no open property involved. What was involved was the entry into the interior of apartment dwellings. The operators of the apartment houses in question had entered into contracts with the tenants to preserve the right of privacy of the tenants in *Watchtower Bible and Tract Society, Inc.* v. *Metropolitan Life Ins. Co., supra.* In the case of *Hall* v. *Virginia, supra*, the Attorney General of Virginia argued that Jehovah's witnesses had the right to use the Monroe Park which adjoined the Monroe Terrace Apartments. In fact Jehovah's witnesses were advertising the public meeting in the Monroe Park by distribution of leaflets when they were arrested for refusal to leave the apartments.

In *Watchtower Bible and Tract Society, Inc.* v. *Metropolitan Life Ins. Co., supra*, counsel for the Metropolitan Life Insurance Co. admitted that Jehovah's witnesses had the right to use the privately owned park located in the community notwithstanding the fact that it was privately owned.

In both of the above cases there was an invasion of the inside of a dwelling not open to the public, which distinguishes them from this case, which involves a park or picnic grounds that is open to the public although privately owned. This is a distinction that cannot be minimized.

The injunction statute, as construed and applied by the trial court and the court below so as to give sanctions to the private regulations of the appellee, like the trespass statute of Alabama in the case of *Marsh* v. *Alabama*, 326 U. S. 501, must fall because, as stated in the *Marsh* case, as construed and applied to the facts and circumstances in this case there has been a deprivation of the rights of freedom of speech, assembly and worship, contrary to the First and Fourteenth Amendments to the United States Constitution which guarantee equal protection of the law, freedom of speech, freedom of assembly and freedom of worship.

Conclusion

WHEREFORE the Supreme Court of the United States should note jurisdiction for final hearing for the purpose of determining whether or not there has been a departure by the courts below from the usual and accepted practice and which have disposed of important and substantial questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX "A"

COURT OF CIVIL APPEALS, GALVESTON, TEXAS

No. 12,374

FORREST G. GOOD, ET AL., *Appellants*,

vs.

THE DOW CHEMICAL COMPANY, *Appellee*

Appeal from the District Court of Brazoria County, Texas

This appeal by them—that is, certain individual members thereof, together with an unincorporated association called "Jehovah's Witnesses"—as Appellants, is from a permanent injunction in favor of The Dow Chemical Company, a private corporation, as appellee, granted by the 23rd District Court of Brazoria County, sitting without a jury.

The writ, in substance, permanently enjoined the appellants from entering upon and holding their "Jehovah's Witnesses" meetings therein, a certain part and "picnic grounds," established and maintained by the appellee for the social and recreational use of itself, its various departments, employees, and friends, on lands adjacent to and adjoining others of its properties around Lake Jackson, in Brazoria County, and especially what were termed its "picnic grounds" adjoining its larger tract, known as the "Lake Jackson Farms Subdivision."

Appellants' points of error here are, in substance, these:

I

"The Rules of Practice and Procedure * * *, and the Statutes of Texas, authorizing injunctions, have been construed and applied by the court below so as to bring them into conflict with the First and Fourteenth Amendments to the United States Constitution, and Sections 3, 6, 8 and 27, of the Constitution of Texas, in that the judgment * * * deprives appellants of their constitutional rights of freedom of assembly, speech and worship.

II

"The trial court failed to hold, on the undisputed evidence * * *, that the appellee was estopped to deny the appellants the right to enter the park and use it for public meetings, in that use, license, and an implied public dedication, were established as a matter of law."

Neither of these presentments, it is determined, should be sustained; upon the contrary, it is held that these two counterpoints by the appellee are fully supported by the undisputed evidence, and the law of Texas, hence that they must be sustained, to-wit:

I

"Since the undisputed evidence established that there was no express dedication of the picnic grounds, roads, and other lands to public use, and clearly negatived any intention of appellee to dedicate the picnic grounds, roads, and other lands to public use, it was therefore established as a matter of law that there has been no dedication, either express or implied, of such picnic grounds, roads, and other lands to public use. Therefore, appellants were properly enjoined from trespassing on undedicated private property.

II

"Appellants' constitutional rights of freedom of assembly, speech, and worship, do not include the privilege of exercising such rights on appellee's undedicated private property, without the consent and against the will of appellee. Accordingly, the judgment enjoining appellants from trespassing upon appellee's undedicated private property did not abridge appellants' constitutional rights."

In the first place, it is plain that—contrary to the undisputed state of the record—the appellants assume that the "picnic grounds" constituted a public park; whereas, the undisputed testimony showed that it never had been intended to be so dedicated, but that the unvarying purpose of the appellee, in its establishment and maintenance, had been, as indicated supra, to maintain these premises for the social and recreational use only of itself, its departments, and

employees, together with their friends. In further pressing their error in that respect, the appellants freely admitted upon the trial, as the statement of facts and the record undisputedly show, that—in pursuance of their insistance that the "picnic grounds" is a public park—they would continue to use those premises as a place upon which to conduct their public meetings, regardless of the appellee's wishes in that matter, unless the court should enjoin them from so doing, which its decree did.

Wherefore, it would be going beyond the requirements to follow the appellants' lead in attempting to apply either the Federal or the State law to what would have been their right to hold their meetings in a public park, where all classes were expressly invited to go; hence, their initial assumption, to quote it from their brief, that "Appellants' constitutional rights to meet in a public park maintained by the appellee have been denied by the permanent injunction issued by the District Court of Brazoria County, on September 20, 1951," is a non-sequitur.

Ramthun v. *Halfman*, 58 Tex. 551; *Oswald* v. *Grenet*, 22 Tex. 94; *International and G. N. R. Co.* v. *Cuneo*, 108 S. W. 714, writ of error refused; *Ladies' Benevolent Society* v. *Magnolia Cemetery Co.*, 288 S. W. 812; *Johnson* v. *Krieg*, 175 S. W (2d) 102, writ of error refused; *Ward* v. *Rice*, 239 S. W. (2d) 823, writ of error refused.

Since under the cited authorities and the given state of the record, it must be held that the trial court properly found not only that the picnic grounds, roads, and other lands here involved constituted undedicated private property of the appellee, it would seem to follow that the appellants had no right to enter thereon, over the protests and objections of the appellee, for the purpose of assembling and speaking, as the trial court found they had declared they would do unless it enjoined them from carrying out that determined purpose upon their part. It would seem to follow—as night the day—that any constitutional rights of the appellants to freedom of assembly, speech, and worship, have not been in anywise abridged by the trial court's injunction against them; in other words, they simply could not exercise those claimed abstract rights on the appellee's

private property, without its permission, and over its objection, since in the attempt to do so they had no higher standing than any other trespassers.

It is thought to follow also that there is no issue of constitutional law involved in this controversy as presented upon this appeal; all of the authorities cited and relied upon by appellants in their brief, under their quoted Point I, plainly involve only the issue of constitutional rights as to freedom of assembly, speech, and worship, in public parks, on public streets, or in other public places—that is, either in places which were publicly owned, or places which had been actually dedicated to public use. The large number of cases they cite upon that subject are, therefore, not material to this controversy.

In a somewhat similar case in the State of Louisiana, where some Jehovah's Witnesses claimed the constitutional right to travel down the private road of a farm, to visit and distribute their literature to tenants at their individual houses, such case being reported under the name of *State* v. *Martin*, 199 La. 39, 5 So. (2d) 377, the court said: " 'These guaranties of freedom of religious worship, and freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begin.' "

See also *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. (2d) 369; and, *Watchtower Bible and Tract Society* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. (2d) 433, 3 ALR (2d) 1423, writ of certiorari denied, 93 L. Ed. 126, 69 S. Ct. 232.

These conclusions require an affirmance of the judgment. It will be so ordered.

Affirmed.

(S.) Geo. W. Graves,
Associate Justice.

Judgment rendered, and opinion filed March 27, 1952.